145 (2)

No. 09-244

Supreme Court, U.S.
FILED
NOV 10 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MIKOLA BOWDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the government files an information under 21 U.S.C. § 851(a), but misstates the statutory enhancement and the date of the prior conviction, and the defendant fails to object in the district court and the defendant's plea does not waive his right to appeal, is the standard of review on a subsequent appeal *de novo* or instead plain error?

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BRIEF IN OPPOSITION

RELEVANT STATUTORY PROVISION

21 U.S.C. § 851(a)(1) provides in relevant part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. . . . Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

STATEMENT

Federal law conditions a court's power to impose an enhanced statutory penalty for certain repeat drug offenders on the Government providing notice to the court and the defendant, before trial or the entry of a guilty plea, of the prior convictions on which it will rely. 21 U.S.C. § 851(a)(1) ("Section 851"). In this case, the Government timely submitted a notice, but it was inaccurate. Respondent expressed confusion regarding the sentence but his counsel did not formally object, and the district court imposed the enhanced sentence. In an unpublished opinion, the Eleventh Circuit applied *de novo* review and held that the Government had violated Section 851. In two subsequent decisions, the Eleventh Circuit has found no violation of Section 851 on similar facts and has

pointedly recognized that the unpublished ruling in this case has no precedential value.

1. Under federal law, any person who manufactures, distributes, or possesses with the intent to manufacture or distribute fifty grams or more of crack cocaine is subject to a sentence of between ten years and life imprisonment. 21 U.S.C. § 841(a)(1); *id.* § 841(b)(1)(A)(iii). The Government may request an enhanced statutory penalty for repeat drug offenders. *Id.* § 841(b)(1)(A). A defendant with two prior felony drug convictions is subject to a mandatory term of life imprisonment. *Id.*

The imposition of an enhanced sentence is conditioned, however, on the Government's compliance with the simple notice procedure of 21 U.S.C. § 851(a)(1). The Government must, before trial or entry of a guilty plea, "file[] an information with the court (and serve[] a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). If the Government needs more time to obtain the facts regarding a prior conviction, it may request a postponement of the trial or guilty plea. In addition, "[c]lerical mistakes in the information may be amended at any time prior to the pronouncement of sentence." *Id.*

2. In May 2006, respondent Mikola Bowden was indicted on one count of possessing with intent to distribute fifty grams or more of crack cocaine. Pet. App. 6a-7a. On July 5, 2006, the Government filed an information pursuant to Section 851 seeking an enhanced sentence. Pet. App. 10a-11a. The Government later stated that it had intended its notice to allege two prior felony drug convictions and to seek

a mandatory life sentence under 21 U.S.C. § 841(b)(1)(*A*). In fact, however, in two separate places, the information instead stated that "the defendant is subject to the increased penalty provisions" of 21 U.S.C. § 841(b)(1)(*B*), which authorize a sentencing range from ten years to life imprisonment. Pet. App. 10a. Nowhere did the information indicate that the Government sought mandatory life imprisonment. Further, the information misstated the date of one of respondent's two prior drug convictions. As the Government later acknowledged, its notice in this case "contained significant errors that made it ambiguous." Br. for United States at 38, *United States v. Anthony*, No. 08-14370, 2009 U.S. App. LEXIS 20194 (11th Cir. Sept. 10, 2009) (describing the notice in this case).

The Government did not amend the notice to correct either error. Both the plea agreement and the plea colloquy contained unclear guidance regarding the possible sentence. Pet. App. 18a-20a, 34a-36a; Resp. C.A. Br. 6-7, 19-21. During his sentencing hearing, respondent in turn expressed his confusion about the enhancement. Pet. App. 48a-49a. The Government acknowledged his confusion. Pet. App. 48a. But respondent's counsel did not object to the notice or enhancement.[1] The district court entered a guilty plea to the single count in the indictment, sentencing respondent to life imprisonment.

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[1] Other documents in the case referred to the Section 841(b)(1)(A) sentencing enhancement, and one document stated the correct date of convictions. Pet. App. 18a, 34a-35a; PSR paras. 3, 38.

3. Respondent's guilty plea did not contain a waiver of his right to appeal, and he challenged the sentencing enhancement in the Eleventh Circuit. Respondent's initial appeal, however, was dismissed as untimely. He then filed a motion under 28 U.S.C. § 2255, arguing that his counsel's failure to timely appeal was constitutionally ineffective. The district court granted the motion and entered a new judgment from which respondent sought to appeal.

Respondent argued in this later appeal that the defects in the information violated Section 851, such that his sentencing enhancement was invalid. In response, the Government argued that its errors were not significant enough to constitute failure to comply with Section 851 under the Eleventh Circuit's decision in *Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001). U.S. C.A. Br. 19. According to the Government, because the text of the statute does not mandate that the information cite the specific statutory basis for the sentencing enhancement, it should follow that the information's citation to the *wrong* statutory provision is irrelevant, even if the incorrectly cited provision calls for a different sentence. *Id.* Similarly, the Government argued, the recitation of an incorrect date of conviction was too insignificant an error to violate Section 851.

The Government did not argue to the panel that the Eleventh Circuit's holding in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998), that Section 851 is a jurisdictional statute has been superseded by this Court's subsequent precedent, including *United States v. Cotton*, 535 U.S. 625 (2002). *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent

panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court . . . ."). Thus, the panel operated from the premise that respondent could challenge the notice in his case, notwithstanding that he did not formally object in the district court. Pet. App. 2a.

In an unpublished, nonprecedential opinion, the court of appeals agreed with respondent that the Government had violated Section 851. The panel reasoned that because the Section 851 notice in this case "did not unambiguously signal to [respondent] that it sought mandatory life imprisonment" and "failed to clearly indicate 'the previous convictions to be relied upon'," the notice of enhancement "did not strictly comply with §851(a)(1)." Pet. App. 1a-3a. The panel vacated respondent's conviction and remanded for resentencing without the enhancement.

On August 26, 2009, respondent was resentenced to a term of 294 months. He will not be released from prison until he is 55 years old. The Government acquiesced to that sentence by not appealing.

4. The Government sought reconsideration in the Eleventh Circuit. It argued for panel rehearing on the ground that the errors in the notice did not violate Section 851 under the Eleventh Circuit's decision in *Perez*. U.S. Pet. Reh'g 6-7.

As noted, the Government could have asked the panel to hold that *Harris* had been superseded by this Court's intervening decisions. But it did not do so. Instead, the Government invited the full court of appeals to sit en banc and overrule *Harris*. The Government acknowledged, however, that the Eleventh Circuit had not overturned a single sentence

under *Harris* in the decade prior to its unpublished opinion in this case. U.S. Pet. Reh'g 8 n.3.

The petition was denied, with no judge requesting that the court be polled on rehearing en banc. Pet. App. 4a.

5. Subsequently, the Eleventh Circuit decided two cases on similar facts, ruling for the Government in each. On September 10, 2009, the court held in another unpublished opinion that, even under *de novo* review, a Section 851 information was sufficient despite failing to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement. *United States v. Anthony*, No. 08-14370, 2009 U.S. App. LEXIS 20194, at *1 (11th Cir. Sept. 10, 2009), *reprinted in* App., *infra* BIO App. 1a. The panel relied on that court's ruling in *Perez*, *supra*, and stated that the unpublished ruling in the instant case was not precedential authority. *Anthony*, BIO App. 13a-14a.

Two weeks later, another panel that included two of the judges who decided the instant case (Anderson and Marcus, JJ.), held, also on the basis of *Perez*, that an incorrect penalty citation in a Section 851 notice is a harmless "technical error" when the correct enhancement provision was listed in the plea agreement and was acknowledged by the defendant at his plea hearing and sentencing. *United States v. Brown*, No. 08-15488, 2009 U.S. App. LEXIS 21370, at *1 (11th Cir. Sept. 25, 2009), *reprinted in* App., *infra* 15a.

ARGUMENT

The Government seeks review of an unpublished, interlocutory ruling that presents only the second time

the Eleventh Circuit has ever overturned a sentencing enhancement under Section 851 applying *de novo* review, and the only such decision in more than a decade. This Court's intervention is unwarranted. The question is not only insignificant, but two intervening decisions demonstrate that the court of appeals' precedent is unsettled. It remains entirely possible that the Eleventh Circuit will reconsider its position. The Government has successfully urged this Court to deny review of the question presented, and no intervening development undercuts the wisdom of that position.

Certiorari should be denied for a number of further reasons as well. This case is a poor vehicle in which to decide the question presented, as the principal issue in the case is the threshold question whether Section 851 was violated at all. If it was not, then the Court would have no cause to decide the statute's "jurisdictional" status. Nor is there any basis for the Government's argument that the judgment should be summarily reversed, a suggestion that only highlights the weakness of its case for plenary review.

I. The Question Presented Does Not Merit This Court's Attention.

A. The Question Whether Section 851 Is A "Jurisdictional" Provision Affects Almost No Cases.

The Government seeks review of a question of startling insignificance. Perhaps the petition's most telling feature is that the Section ostensibly devoted to explaining why "[t]he Question Presented is important," Pet. Part C, actually contains no

discussion of that critical element of this Court's certiorari calculus. Though it has filed briefs in this Court on this issue three times – each time opposing review, *see infra* at 12-13 – the Government has never before suggested that the question has any recurring significance. That is because it does not.

The Government complains that the Eleventh Circuit alone applies *de novo* review to erroneous Section 851 notices when the error was not noted in the district court. But respondent appears to be the only individual whose sentencing enhancement has been overturned by the Eleventh Circuit on that basis in the decade since its decision in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). Indeed, *Harris* and this case appear to be the only two rulings in the entire history of the Eleventh Circuit in which the court of appeals invalidated a sentence for noncompliance with Section 851 on a ground that had not previously been presented to the district court.

The reason the question presented almost never arises is readily apparent. The Eleventh Circuit's published precedent holds that technical violations of Section 851 do not invalidate sentencing enhancements. *See Perez v. United States*, 249 F. 3d 1261, 1266 (11th Cir. 2001) (holding that a timely filed notice that "unambiguously signal[s] the government's intent to rely upon a specific" prior conviction satisfies the requirements of Section 851 regardless of minor errors in content); *infra* at 16 (discussing additional recent rulings). In such cases, the question whether

Section 851 imposes a "jurisdictional" requirement never arises.[2]

Thus, a defendant generally can receive relief under Eleventh Circuit precedent only when both (a) the Government fails to file the required notice, and (b) the defendant fails to raise the error in the district court. But a defendant in that circumstance can in any event receive relief from the courts – rendering the "jurisdictional" status of Section 851 irrelevant – through a claim of ineffective assistance of counsel. In fact, in the very case that the Government now applauds for engaging in a "careful analysis" of Section 851 and concluding that the statute is not "jurisdictional," Pet. 16, the First Circuit actually concluded that "because the section 851(a)(1) claim was a clear winner and presenting it would have risked nothing, counsel's eschewal of it amounted to constitutionally deficient performance." *Prou v.*

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[2] Eleventh Circuit precedent is consistent with decisions of other courts of appeals on the question of whether minor defects invalidate a Section 851 notice. *See, e.g., United States v. Curiale*, 390 F.3d 1075, 1076-77 (8th Cir. 2004) (per curiam) ("An information complies with the requirements of § 851(a) even if it contains an error in its contents as long as the information serves to convey the Government's intent to seek an enhancement based on a particular earlier conviction." (citing *Perez*, 249 F.3d at 1265)); *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001) ("Accordingly, '[o]ur inquiry must be whether the information which was filed provided [the defendant] reasonable notice of the government's intent to rely on a particular conviction and a meaningful opportunity to be heard.'" (quoting *Perez*, 249 F.3d at 1266)).

United States, 199 F.3d 37, 48 (1st Cir. 1999) (granting relief under 28 U.S.C. § 2255).

Furthermore, the Government's complaint that the Eleventh Circuit's application of *de novo* review recognizes errors that other circuits would overlook on plain error review ignores that, given the clear and simple terms of Section 851, those other circuits in fact may deem such errors to be "plain." *See, e.g.*, *United States v. Hardin*, 108 Fed. Appx. 74, 79 (4th Cir. 2004) (unpublished) ("[I]t was plain error for the district court . . . to rely on offenses not noticed in the information filed by the government."); *see also Prou*, 199 F.3d at 48-49 (finding on collateral review that, when the government filed the Section 851 notice nineteen days after the jury was empaneled, "the government's blunder was manifest" and prejudicial to the defendant). Any disagreement among the circuits is thus inconsequential.

B. The Government Itself Can Ensure The Proper Application Of Section 851.

The question presented also lacks significance because it need *never* arise. Compliance with Section 851 lies completely within the control of the Government. So long as the prosecution follows the statutory requirements in the district court, the question whether its provisions are "jurisdictional" for purposes of appeal is entirely academic. That is significant because the requirement imposed by the statute is so straightforward and easy to comply with. The Government need only notify the court and the defendant of the prior convictions on which it relies in seeking an enhanced sentence. 21 U.S.C. § 851(a)(1). The Government may freely secure postponement of

the trial or guilty plea colloquy if it needs additional time. *Id.* Further, the prosecution may correct errors in the notice at any point before sentencing. *Id.*

Even when the Government does violate Section 851, the defendant's sentence is generally resolved by the terms of the plea agreement. Such an agreement regularly includes a waiver of the defendant's right to appeal the sentence to which he has just agreed. The position of the Government, supported by the only court of appeals to decide the question, is that such a waiver extinguishes the defendant's right to challenge the Section 851 notice on appeal. *See* Br. of United States at 20, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370 (citing *United States v. Rodriguez*, 137 Fed. Appx. 682 (5th Cir. 2005); *United States v. Anguiano*, 197 Fed. Appx. 342 (5th Cir. 2006)).

The Seventh Circuit recently summarized most of these points, in a characteristically blunt opinion by Judge Posner which demonstrates that the answer to the Question Presented lies in the hands of the Government itself:

> The government takes a risk by sloppy compliance (or perhaps it is not compliance at all) with section 851(a)(1): the risk that either the court will hold that the government failed to provide the defendant with adequate notice or that the defendant will have a claim that by failing to interpret a confusing notice correctly his lawyer rendered ineffective assistance of counsel. For these reasons and to spare us pointless appeals, the U.S. Attorney's office that prosecuted this case would be well advised to get its act together and comply strictly with

> section 851. It might also be wise for the Department of Justice to notify all the U.S. Attorneys of the importance of strict compliance, as the problem of non-compliance or sloppy compliance seems to be widespread, judging from the number of cases. And it is not as if strict compliance were difficult.

United States v. *Williams*, No. 09-1924, 2009 U.S. App. LEXIS 22496, at *13-*14 (7th Cir. Oct. 14, 2009).[3]

C. As The Government Has Previously Argued, This Court's Intervention Is Unwarranted Because The Law Of The Eleventh Circuit Is Unsettled.

It is difficult to conceive of a worse allocation of this Court's scarce time than to review an issue that affects only a single individual in the entire country once every ten years, particularly when the Government can address its concerns by following the simple terms of the statute and when the "relief" to which the Government objects is (as in this case) the imposition of a lengthy twenty-five-year term of imprisonment. Instead, this Court should follow the view consistently advanced by the Government in

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[3] There is no inconsistency between Judge Posner's point that appeals under Section 851 arise with some regularity and respondent's point that defendants almost never receive relief even under the *de novo* standard adopted by the Eleventh Circuit in *Harris*. Instead, the fact that the issue continues to arise even in the Seventh Circuit (which applies the rule endorsed by the Government) illustrates that the application of plain error review does not reduce the number of appeals filed by defendants and thus does not produce any greater efficiency.

"oppos[ing] petitions for a writ of certiorari in several cases presenting this issue," Pet. 18, until it lost this one case in an unpublished opinion: this question does not require this Court's intervention. *See* Br. in Opp. at 13-14, *Beasley v. United States*, 128 S. Ct. 1471 (2008) (No. 07-548);[4] *see also* Br. in Opp. at 8-9, *Severino v. United States*, 540 U.S. 837 (2003) (No. 02-10095); Br. in Opp. at 7-8, *Quintanilla v. United States*, 538 U.S. 926 (2003) (No. 02-7455).

Among other things, the Government has correctly and successfully urged this Court to allow the Eleventh Circuit to reconsider its decision in *Harris* in light of this Court's intervening precedents. Nothing about the ruling in this case changes that calculus. If the Government's arguments in its petition have merit, the Eleventh Circuit panel would have been fully empowered to reconsider *Harris*. *See, e.g.*, *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("It is the law of this Circuit that a subsequent panel is not obligated to follow a prior panel's decision where an intervening Supreme Court decision establishes that the prior panel decision is wrong."). In fact, other circuits have reconsidered this very issue without resorting to en banc review. *See, e.g.*, *United States* v.

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[4] The Government's opposition in *Beasley* asserted, at 7-8, that the case was an inappropriate vehicle to decide the question presented because the defendant's sentence did not depend on an enhancement under Section 851. Subsequently, however, the Solicitor General withdrew that argument, recognizing that it was erroneous. *See* Letter from Paul D. Clement, Solicitor Gen., to William K. Suter, Clerk of the Supreme Court of the U.S. (Feb. 19, 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/02/beasley-correction-letter.pdf.

Flowers, 464 F.2d 1127, 1130 n.1 (10th Cir. 2006); *United States* v. *Ceballos*, 302 F.3d 679, 692 n.4 (7th Cir. 2002). But for reasons known only to itself, the Government chose *not* to make that request, either in its initial briefing or in its petition for rehearing.

The Government instead only invited en banc review of the vitality of *Harris*, which was denied. But that creates no inference that the Eleventh Circuit's position is settled. Given the utter triviality of the issue, *see supra*, it is not surprising that the full court decided that the issue did not warrant its attention, given that the opinion in this case is unpublished and nonprecedential, and a later panel remains free to reconsider the question if and when – in another decade or so – another defendant could receive relief on the basis of *de novo* review.

The Government's contrary assertion that "[t]he Eleventh Circuit has repeatedly declined invitations to reconsider its position," Pet. 18, is a significant overstatement and somewhat revisionist history. The Government apparently filed rehearing requests only a decade ago in *Harris* (prior to the decisions of this Court on which the Government relies) and in the unpublished ruling in this case. As discussed above, the Government has repeatedly (and successfully) urged the denial of certiorari on precisely the ground that the Eleventh Circuit has *not* been provided with an appropriate opportunity to reassess *Harris*. Given the Government's curious failure to put that question before the panel in this case, its prior consistent position that this Court's intervention would be premature remains entirely sound.

For related reasons, the Government's newfound assertion in this Court that Eleventh Circuit precedent

is fixed is also an overstatement. In opposing review in *Beasley*, *supra*, the Solicitor General found it noteworthy that the Eleventh Circuit had only even "restated" the holding of *Harris* in a published ruling "in *dicta*." Br. in Opp. 14 n.7. Of particular note, the Government continues to maintain in its briefs in the Eleventh Circuit that the court of appeals' *existing* precedent provides that objections to notices under Section 851 that are *not* first raised in the district court are nonetheless "review[ed] . . . for plain error." Br. of United States at 24-25, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370 (citing *United States v. King*, 73 F.3d 1564, 1572 (11th Cir. 1996)). Thus, in this Court, the Government urges review by broadly characterizing *Harris* as holding that "the government's failure to file a notice *in full compliance* with the requirements of 21 U.S.C. 851(a) divests a district court of 'jurisdiction' to impose an enhanced sentence on a recidivist drug offender." Pet. 11 (emphasis added). But in the Eleventh Circuit itself, the Government reads *Harris* as much more narrowly limited to circumstances in which "the prosecutor filed the § 851 notice after the plea hearing, not before it," such that whenever the notice is timely filed (*even if erroneous*), "*Harris* does not provide support for [the] Defendant's argument." Br. of United States at 29, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370. Thus, in cases involving alleged errors in the substance of the notice as opposed to its timely filing, "[b]ecause there is no clear statutory or precedential authority which clearly states that the Government's notice would not be sufficient, the district court cannot be found to have plainly erred." *Id.* at 30.

Cases handed down since the Government filed its petition only reinforce the wisdom of awaiting further developments in the Eleventh Circuit. That court's two most recent rulings on the question narrowly construe a defendant's right to relief under Section 851 and note the unsettled state of its precedents, indicating that this case is arguably anomalous. In *United States v. Anthony*, an Eleventh Circuit panel applied *Perez* to hold that a Section 851 notice was sufficient despite its failure to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement. The panel notably deemed the defendant's reliance on the decision in the instant case to be "misplaced" because the circuit is "not bound by unpublished opinions." BIO App. 13a.

Another Eleventh Circuit panel – which included two of the judges from this case – then also applied *Perez* to uphold a Section 851 notice on facts similar to the present case, reasoning that the Government's erroneous citation of a penalty provision was a "technical error," and that the Government's intent remained unambiguous because the correct enhancement provision was listed in the plea agreement and was acknowledged by the defendant at his plea hearing and sentencing. *United States v. Brown*, BIO App. 28a-29a.

Notably, those same judges recognized the "thorny jurisdictional and waiver issues" that arise in cases involving Section 851, and took care to note that the Eleventh Circuit had "not had an opportunity" to consider the effect, if any, of *Harris* because the court's determination that a technical error does not invalidate the statutory notice meant that the

defendant's appeal "lack[ed] merit in any event." BIO App. 27a.

II. This Is A Poor Vehicle In Which To Decide The Question Presented.

Even if it were appropriate in some case to grant certiorari to decide the Question Presented, this is a uniquely poor vehicle in which to do so. There is a very real prospect that the Court would never reach the issue of whether Section 851 is a "jurisdictional" statute.

The Government's principal position throughout this case has been that it never violated Section 851 in the first place. In the Eleventh Circuit, the Government argued that the "enhancement information satisfied the requirements of 21 U.S.C. § 851(a)(1)." U.S. C.A. Br. 13. The citation of the wrong sentencing enhancement, the Government argued, was not a violation because "section 851(a)(1) does not require an enhancement information to provide notice of the penalty provisions of section 841." U.S. C.A. Br. 19. The incorrect date of respondent's conviction was merely a technical error, the Government continued, because the information still unambiguously signaled the government's intent and did not confuse respondent about which convictions were being relied upon. U.S. C.A. Br. 19; *see Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001).

As discussed above, rulings in the Eleventh Circuit in the wake of the unpublished decision in this case suggest considerable sympathy for the Government's view of the narrow class of errors that will invalidate an enhanced sentence under Section 851. If this Court were to agree with those more

recent Eleventh Circuit rulings, that narrow ground of decision would make it unnecessary for this Court to reach the Question Presented: whether challenges to notices under Section 851 are subject to *de novo* or instead plain error review when not first raised in the district court. As the Government has forthrightly acknowledged, the precise circumstances in which a notice comports with Section 851 has "no importance beyond the particular circumstances of th[e] case and therefore does not warrant this Court's review." Br. in Opp., *Severino*, *supra*, at 12.

The Government's petition relies heavily on the facts supporting its central argument that "the defects in the information" did not violate Section 851. Pet. 23. But even if the Government itself attempted to limit its own argument to the question whether Section 851 is a "jurisdictional" statute, there is every reason to believe that the Court would appropriately first consider the narrower ground of decision on which the Government principally relied below – namely, whether the statute was violated in the first instance. *Cf. United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (where the Government sought to present only the question whether errors in an indictment are subject to harmless error analysis, deciding the case instead on the narrower ground that the indictment in fact contained no error). And in analogous circumstances, the Solicitor General has successfully opposed review of the Question Presented when the determination that "the government did comply with the requirements of Section 851(a)," made it "unnecessary to decide 'whether a section 851(a) error can be waived or forfeited.'" Br. in Opp. *Severino*, *supra*, at 8 (citation omitted).

Instead, the Court should decide the Question Presented, if ever, when it is presented in a case that does not raise a substantial issue regarding the antecedent question whether Section 851 was violated at all. Such a case would arise when the Government either fails to provide notice of the enhancement, or fails to do so "before trial [or] before entry of a plea of guilty." 21 U.S.C. § 851(a)(1). Such a case would squarely present the question of whether that error should be reviewed *de novo*.

Granting review in such a case, unlike this one, would also have the benefit of resolving a circuit conflict over the consequences of an untimely Section 851 information. In *Prou v. United States*, 199 F.3d 37 (1st Cir. 1999), the First Circuit held that the government's failure to file the information until nineteen days after the jury had been empaneled was prejudicial error, and granted relief under 28 U.S.C. § 2255. In contrast, the Fifth Circuit held in *United States v. Dodson*, 288 F.3d 153 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002), that the Government's failure to file any notice at all did not even amount to plain error, and denied the defendant relief on direct appeal.

Finally, the procedural posture in this case adds a further layer of complication that makes it an undesirable vehicle. After his initial sentencing, respondent failed to file a timely appeal. Only after he succeeded in a motion under 28 U.S.C. § 2255 arguing that his counsel was constitutionally ineffective was respondent able to appeal to the Eleventh Circuit, resulting in the decision below. This adds an additional element of uncertainty regarding the appropriate standard of review in this particular case.

III. The Eleventh Circuit's Decision Was Correct On The Merits.

A. This Court's Recent Precedents Support The Eleventh Circuit's Decision And Demonstrate That Summary Reversal Is Inappropriate.

Implicitly recognizing the triviality of its request for plenary review, the Government invites the Court to summarily reverse the court of appeals' unpublished ruling. Summary reversal, however, is "usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). *See also Spears v. United States*, 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting) (referring to summary reversal as "bitter medicine"); *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting) (calling it an "extraordinary remedy"). The Government is wrong to request such a potent potion here because no decision of this Court dictates the outcome of this case.

The Government bases that request on the erroneous assertion that the Eleventh Circuit's approach is out of step with an inexorable trend toward a singular, narrow definition of "jurisdictional." Pet. 12-15. In fact, this Court's precedent – particularly *Bowles v. Russell*, 551 U.S. 205 (2007) – supports the ruling below. *Bowles* is this Court's most on-point recent decision, yet it receives no mention in the Government's petition. In *Bowles*, the Court held that a party's filing of a notice of appeal outside the prescribed time limit of Federal Rule of Appellate

Procedure 4(a)(1)(A) and 28 U.S.C. § 2107(a) was a jurisdictional defect. The Court drew a "distinction between court-promulgated rules and limits enacted by Congress," finding the latter jurisdictional in nature. 551 U.S. at 211-12.

Section 851 necessarily falls on the statutory – and therefore jurisdictional – side of the ledger. Indeed, the logic behind this Court's holding in *Bowles* applies here. In both cases, Congress exercised its authority to establish procedural prerequisites to the invocation of a court's powers. In both cases, the failure to follow that requirement ran contrary to the statutory purpose of providing proper notice to opposing parties. As this Court recognized, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212-13. In adopting Section 851, Congress allowed courts to issue significantly enhanced punishments, but *only* upon the proper filing of an accurate information by the prosecutor. In other words, Section 851 embodies Congress's ability to determine "under what conditions" federal courts can hear cases and was therefore properly determined by the Eleventh Circuit to be jurisdictional.

Similarly, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), another case the Government ignores, the Court held that 28 U.S.C. § 2501, a statute of limitations governing the Court of Federal Claims, requires a court to raise *sua sponte* the timeliness of a lawsuit. The Court relied on the strict language in the provision, which mandates that all claims over which the Court of Federal Claims "has jurisdiction shall be barred" unless filed within six

years. 552 U.S. at 755. The Court further noted that such absolute time limits – which can also serve broader goals such as "facilitating the administration of claims" or "promoting judicial efficiency" – were sometimes referred to as "jurisdictional." *Id.* at 753.

It would be particularly inappropriate and unfair to invoke the bitter medicine of summary reversal in this case, subjecting respondent to a life in prison, when the Solicitor General has elected not to discuss in the petition either of the two cases that most undercut the Government's position – *Bowles* and *John R. Sand & Gravel Co.* – thereby depriving respondent of any opportunity to address the Government's view of those central decisions.

The precedents that the Government does discuss – *Kontrick v. Ryan*, 540 U.S. 443 (2004), *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), and *United States v. Cotton*, 535 U.S. 625 (2002) – all predate both *Bowles* and *John R. Sand & Gravel Co.* and are distinguishable from this case. In *Kontrick*, this Court held that Bankruptcy Rules 4004 and 9006 – which do not have a statutory origin – are not jurisdictional. 540 U.S. at 453-54 (noting that the rules are court-prescribed, and holding that they are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate"). *Eberhart* merely follows *Kontrick*, again holding that non-statutory-based rules – Federal Rules of Criminal Procedure 33 and 45 – were non-jurisdictional. 546 U.S. at 15 ("The Rules we construed in *Kontrick* closely parallel those at issue here."). *Bowles* thus highlights that recent decisions – including *Kontrick* and *Eberhart* – have "recognized the jurisdictional significance" of a statutory origin. 551 U.S. at 210.

The Court's decision in *Cotton* similarly does not dictate the outcome of this case. This case involves a heightened statutory requirement governing the prosecutor's conduct. In *Cotton*, on the other hand, this Court considered whether, in the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a deficient indictment could lead to an enhanced sentence. The defendants in *Cotton* were charged under the wrong section of 21 U.S.C. § 841, which delineates penalty levels for drug crimes. 535 U.S. at 627-28. However, the prosecutors in that case failed to meet the Court-ordered requirements of *Apprendi* – not the terms of the statute itself. Section 851, by contrast, establishes congressionally created mandates governing the content to be included in an information. The mere fact that all of the cases cited by petitioner contain language guarding against the overuse of the term "jurisdictional" is of no moment. The term is properly applied here.

Summary disposition of this case would be particularly inappropriate because of its potential to undercut the doctrinal clarity that has emerged in the wake of this Court's ruling in *Bowles*. The line of demarcation drawn by this Court has been widely noted and embraced in the lower courts. *See, e.g.*, *Dill v. Gen. American Life Ins. Co.*, 525 F.3d 612, 617 (8th Cir. 2008) (citing *Bowles* for the proposition that "[t]ime limits prescribed by statute are jurisdictional"); *United States v. Griffin*, 524 F.3d 71, 84 (1st Cir. 2008) (citing *Bowles* and holding that Federal Rule of Criminal Procedure 35(a) is jurisdictional because it is incorporated into a statute); *United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008) (holding that Federal Rule of Criminal Procedure 4(b) is not jurisdictional

because its origins are not statutory); *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007) (same).

By contrast, the Government is unable to identify any question of broader significance that the summary disposition of this case would help to resolve, or any other reason to believe that a ruling in its favor would be useful to the lower courts. The Government asserts that the isolated result in this case "conflicts with basic principles of fairness and efficiency in judicial practice." Pet. 21. But that type of complaint is not a recognized basis for this Court's intervention. *See* S. Ct. R. 10.

There is thus a striking contrast between the appropriate disposition of this case and *Eberhart*, the illustrative summary reversal cited by the Government. Pet. 23. *Eberhart* addressed whether noncompliance with Federal Rule of Criminal Procedure 33's deadline for new trial motions was "jurisdictional." *See* 546 U.S. at 13. That issue is of surpassing importance: it has the potential to arise in the wake of *any* federal criminal conviction. By contrast, as noted, respondent is the only defendant to whom the Eleventh Circuit has granted relief on the ground that Section 851 is a jurisdictional statute in the past decade. Further, the Seventh Circuit in *Eberhart* had all but invited summary reversal, noting that the vitality of its own precedent was doubtful but stating that it was bound to follow it "'until expressly overruled by the Supreme Court.'" *Id.* at 14-15 (quoting *United States v. Eberhart*, 388 F.3d 1043, 1049 (7th Cir. 2004)). Here, by contrast, the status of the Eleventh Circuit's precedent is uncertain and there remains a substantial prospect that the court of

appeals will later revisit its position. Finally, in *Eberhart*, there was a "close[] parallel" between the relevant rules of criminal procedure and the bankruptcy rules at issue in *Kontrick*. *Eberhart*, 546 U.S. at 15. No such parallel exists here. Unlike *Eberhart* and *Kontrick*, this case involves a statutory mandate, which under *Bowles* amounts to a jurisdictional requirement.

B. The Eleventh Circuit's Decision Properly Comports With The Statute's Plain Language And Congressional Intent.

The Eleventh Circuit's decision to "require strict compliance" with the procedural and substantive requirements of the statute, Pet. App. 2a, conforms to the statutory text, as well as the purpose of Section 851. Congress expressly prohibited courts from issuing an enhanced statutory penalty unless "the United States attorney files an information with the court . . . stating in writing the previous convictions *to be relied upon*." 21 U.S.C. § 851(a)(1) (emphasis added). By incorrectly citing both the applicable sentencing enhancement *and* respondent's relevant prior conviction, the prosecution failed to satisfy that statutory requirement.

This Court has long recognized that improper notice can trigger a due process violation. *See Oyler v. Boles*, 368 U.S. 448, 452 (1962) (holding that in a criminal proceeding, due process guarantees the "right to reasonable notice and opportunity to be heard" regarding sentence enhancements); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the

Due Process Clause."). The notice provision in Section 851 was installed as a bulwark against precisely these concerns, as multiple courts of appeals have expressly recognized. *See, e.g.*, *United States v. Morales*, 560 F.3d 112, 116 (2d Cir. 2009) ("[I]gnoring a misleading government statement of potential penalties would create serious due process issues if it interfered with the defendant's preparation for trial or caused him or her not to plea bargain for a lesser sentence."); *United States v. Mayfield*, 418 F.3d 1017, 1020 (9th Cir. 2005) ("Section 851(a) was enacted to fulfill the due process requirements of reasonable notice and an opportunity to be heard with regard to the prior conviction." (citing *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1485 (10th Cir. 1994)); *United States v. Curiale*, 390 F.3d 1075, 1076 (8th Cir. 2004) ("The statute aims to give the defendant notice to comply with due process." (citing *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001)). Considering the strict requirements of Section 851 – and the grave underlying constitutional considerations – the Eleventh Circuit rightly recognized and disallowed the potential for faulty notice in cases such as this one where the prosecution commits multiple errors.

Congress had broad, systemic goals in enacting Section 851. The provision struck a balance between the authority of prosecutors to seek enhanced statutory penalties – penalties that can dramatically increase a defendant's term of imprisonment – and the need to provide procedural protections to defendants. But by enacting this law and "eliminating some of the difficulties" faced by prosecutors, H.R. Rep. No. 91-1444, at 4576 (1970), Congress in turn required the

Government to comply with the exacting language of the new provision.

In this case, the Eleventh Circuit's decision corrects the prosecution's failure to uphold its end of the statutory bargain. The Government has expressly recognized that its "notice contained significant errors that made it ambiguous." Br. for United States at 38, No. 08-14370, *United States v. Anthony*, 2009 U.S. App. 20194 (11th Cir. Sept. 10, 2009). Sustaining the notice in the face of that ambiguity would have displaced the careful balance that Congress struck and, in effect, permitted a sentence to be imposed in a manner that Congress forbade. Strict observance of the requirements of Section 851 is required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution and not to the courts. As the Fifth Circuit recognized thirty-five years ago in *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974), "[i]n granting this discretion to the prosecution, Congress imposed a strict condition on its exercise." Both the extent of that discretion and the strict limits on how it may be exercised demonstrate Congress's intent that executive branch compliance with Section 851 be necessary to trigger the jurisdiction of the courts. *See United States v. Cespedes*, 151 F.3d 1329, 1333-34 (11th Cir. 1998).

This Court has held that the decision to provide notice under Section 851 is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *see also Cespedes*, 151 F.3d

at 1333. A court has no greater jurisdiction to enter an enhanced statutory sentence based on a defective information from the prosecution than it would have to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a Section 851 notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. *See In re Ellis*, 356 F.3d 1198, 1209-10 (9th Cir. 2004). The government's contention that Section 851 "does not affect a court's power to entertain the case," Pet. 12, is thus far too sweeping to be accurate, and is a product of the Government's artificially narrow concept of "jurisdiction." Section 851 directly affects the court's power to entertain cases where the prosecutor must first meet the mandatory threshold of filing a timely and accurate information – a prerequisite that was not met here.

Congress knowingly raised the stakes for both sides by implementing Section 851. The Eleventh Circuit's current precedent allows the court to vindicate the importance of the notice function of Section 851 while appropriately distinguishing cases where that function was not undermined. *See United States v. Brown*, BIO App. 29a (finding that "[d]espite the citation error, Brown was fully aware" of the proper penalty provisions); *United States v. Anthony*, BIO App. 14a (noting that the defendant indicated "that he was not confused by the failure to list" the proper statutory provision in the information). The Eleventh Circuit's fact-bound ruling in this case properly comports with Congressional intent and the plain language of this statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11935
Non-Argument Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
V.
MICHAEL ANTHONY, DEFENDANT- APPELLANT

Jan. 7, 2009

PER CURIAM:

Michael Lamar Anthony appeals his convictions and 120-month sentences for possession with intent to distribute crack, cocaine, heroin, and marijuana, in violation of 21 U.S.C. § 841. Anthony now appeals, arguing (1) the court erred by denying his motion to suppress evidence seized from his apartment; (2) various improper statements at trial by the court and prosecutor amounted to misconduct and prejudiced his case; and (3) the notice of enhanced penalties was insufficient under 21 U.S.C. § 851 to confer jurisdiction. After a thorough review of the record and the parties' briefs, we affirm.

1. Motion to Suppress

"A district court's ruling on a motion to suppress presents a mixed question of law and fact." *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir. 1999). We accept the district court's findings of fact to be true, unless shown to be clearly erroneous, and review *de novo* the district court's application of the law to those facts. *Id.* "[A]ll facts are construed in the light most favorable to the prevailing party below." *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir. 2000). "The individual challenging the search bears the burdens of proof and persuasion." *United States v. Cooper*, 133 F.3d 1394, 1398 (11th Cir. 1998). In reviewing the denial of a motion to suppress, we may consider the entire record. *United States v. Newsome*, 475 F.3d 1221, 1224 (11th Cir. 2007).

Although the Fourth Amendment shields one's home from unreasonable searches and seizures by law enforcement officers, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1947 (2006). One exception is a warrantless search made pursuant to voluntary consent. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Katz v. United States*, 389 U.S. 347, 357 (1967). Consent is voluntary "if it is the product of an 'essentially free and unconstrained choice.'" *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001) (quotation omitted). The government bears the burden of proving the existence of valid consent – that the consent was given voluntarily and not in acquiescence to a claim of lawful authority. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir.

1989). Consent "usually turns on credibility choices resulting from conflicting testimony." *United States v. Gonzalez*, 71 F.3d 819, 828 (11th Cir. 1996) (internal quotations marks omitted). Credibility determinations are within the province of the fact finder "because the fact finder personally observes the testimony and is thus in a better position than a reviewing court to assess the credibility of witnesses." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). We "must accept the evidence unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Id.* (alteration in original) (quotation omitted).

In this case, Miami-Dade Police Detective Kevin Richardson, Detective William Padraja, and Sergeant Jose Ramirez testified that they went to Anthony's apartment after receiving an anonymous tip. Catherine Cannady, Anthony's mother and the lease holder on the apartment, answered the door, invited them in, and gave both written and verbal consent to search the apartment. Cannady was calm and cooperative and was not pressured or coerced to give consent. Cannady escorted the officers to the bathroom where they spoke with Anthony, who identified his bedroom and gave verbal consent to a search. Police found drugs, drug paraphernalia, and a firearm. Anthony was arrested and given his rights, after which he admitted the contraband was his and stated that his mother knew nothing about it. Police also searched the bathroom and found more drugs, which Anthony also admitted were his.

Cannady testified that when she opened the door, there were about seven or eight officers there. One of the officers slid his foot over the threshold so she could

not close the door. After the officers entered the apartment, one officer pushed a form at her. She was very nervous, did not know what the form was, and felt pressured to sign it. Although she allowed the police entry into her home and permitted them to look around, she did not think she had given consent to a search. Nevertheless, she admitted that she had written her address on the consent form and had signed and dated it. She also admitted that she signed the form where it indicated that consent had been given freely.

Upon review, we conclude the district court properly denied the motion to suppress. The magistrate judge explained that the officers' testimony was more credible than Cannady's.[1] Viewing the evidence in the light most favorable to the government, the testimony established that three officers arrived at Anthony's apartment, identified themselves, and informed Cannady that they were investigating a tip. Cannady invited them in; she was calm and cooperative as she signed the consent form and led the officers through the house. On these facts, Anthony has not shown that the initial entry into the apartment or the subsequent consent to search was invalid. *See United States v. Ramirez-Chilel*, 289 F.3d

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[1] In his motion to suppress and objections to the magistrate judge's recommendation, Anthony argued that the consent was involuntary but did not explicitly argue that the initial entry was invalid. In a single sentence, which is insufficient to preserve the issue, Anthony stated that seven or eight officers arrived at the house and one officer placed his foot in the door to prevent Cannady from closing it. He offered no law to argue that this entry was illegal or non-consensual. Nevertheless, a review of the evidence establishes that the initial entry into the apartment was consensual and not the result of coercion or a show of authority.

744 (11th Cir. 2002) (deferring to magistrate judge's credibility determination where magistrate judge explained reasons for finding police more credible and report indicated that magistrate judge had considered all the testimony).

2. Alleged Errors at Trial

Anthony argues that the following instances of prosecutorial and judicial misconduct prejudiced his case: (1) the court's explanation of the charges against Anthony during opening statements, stating "if I may put it in this fashion for the jury to understand, operating sort of a pharmacy or drug store"; (2) the prosecutor's reference in opening statements that "in the words of a convicted felon," Anthony admitted his possession of the gun and drugs; (3) the court's refusal to allow defense counsel to offer its view of the evidence during opening statements; and (4) the prosecutor's reference in rebuttal to Anthony going home, which implied that he was in custody. According to Anthony, the cumulative effect of these errors compels reversal of his convictions.

We review a judge's comment on evidence for an abuse of discretion. *See, e.g.*, *United States v. Berdick*, 555 F.2d 1329, 1330 (5th Cir. 1977).[2] Allegations of prosecutorial misconduct present mixed questions of fact and law that are reviewed *de novo*. *United States*

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), this court held that all decisions handed down by the former Fifth Circuit before the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit.

v. Noriega, 117 F.3d 1206, 1218 (11th Cir. 1997). We review a claim that the district court improperly limited a defendant's opening statement for an abuse of discretion. *See United States v. Burns*, 298 F.3d 523, 543 (6th Cir. 2002) (stating a district judge's conduct of a trial, including opening statements, is reviewed for an abuse of discretion) (persuasive authority). The denial of a motion for a mistrial is reviewed for abuse of discretion. *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2790 (2009). When a defendant fails to object to an error before the district court, we review the argument for plain error. *United States v. Hall*, 314 F.3d 565, 566 (11th Cir. 2002); *see also United States v. Olano*, 507 U.S. 725, 731-32 (1993). "Plain error occurs where (1) there is an error; (2) that is plain or obvious; (3) affecting the defendant's substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Hall*, 314 F.3d at 566; *Olano*, 507 U.S. at 732.

a. The court's statement

Anthony challenges the district court's statement to the jury that Anthony was operating a drug store. Because Anthony failed to object at trial, we review this issue for plain error.

Remarks may constitute error if they (1) were improper and (2) prejudiced the defendant's substantive rights. *United States v. Delgado*, 56 F.3d 1357, 1368-1369 (11th Cir. 1995). Furthermore, "[a]

clear effect on the jury is required to reverse for comment by the trial judge." *United States v. Morales*, 868 F.2d 1562, 1576 (11th Cir. 1989). "[I]n order to amount to reversible error, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case." *United States v. Ramirez-Chilel*, 289 F.3d 744, 750 n.6 (11th Cir. 2002); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir. 2005).

Here, the court's statement was a single, isolated comment. The jury heard testimony that Anthony admitted possession of the drugs. In light of this evidence, Anthony cannot show that he was prejudiced by the court's comment.

b. The prosecutor's opening statement

Anthony next challenges the prosecutor's reference during open statement to Anthony's status as a convicted felon. Again, we review this claim for plain error.

Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused. *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1198 (11th Cir. 2000). When we review an issue of prosecutorial misconduct, we must determine (1) whether the challenged comments were improper and (2) if so, whether they prejudiced the defendant's substantial rights. *United States v. Paul*, 175 F.3d 906, 909 (11th Cir. 1999). "A defendant's substantial rights are prejudicially affected when a

reasonable probability arises that, but for the remarks, the outcome of the trial would have been different." *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006). "This court gives 'considerable weight to the district court's assessment of the prejudicial effect of the prosecutor's remarks and conduct.'" *Cordoba-Mosquera*, 212 F.3d at 1198 (internal citation omitted). When the record contains sufficient independent evidence of guilt, such error is usually harmless. *United States v. Adams*, 74 F.3d 1093, 1097-98 (11th Cir. 1996).

Here, the prosecutor stated in opening remarks that Anthony was a convicted felon who had admitted possession of the drugs. During trial, Anthony stipulated that he had a prior felony conviction. The jury then heard testimony that Anthony admitted possessing the drugs. Anthony cannot show that the alleged error resulted in prejudice.

c. Defense counsel's opening statement

Anthony next challenges the court's limitations on defense counsel's opening statement. An opening statement gives counsel the opportunity to state what evidence will be presented in order to make it easier for the jurors to understand what is to follow, and is not an occasion for argument. *United States v. Zielie*, 734 F.2d 1447, 1455 (11th Cir. 1984), *abrogated on other grounds by United States v. Chestang*, 849 F.2d 528, 531 (11th Cir. 1988). "The scope and extent of the defendant's opening statement rests largely in the discretion of the trial court." *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975)

(persuasive authority). The court "can exclude irrelevant facts and stop argument if it occurs." *Zielie*, 734 F.2d at 1455.

Here, defense counsel's statements constituted argument and did not inform the jury as to the evidence it would hear. Accordingly, the district court's warnings to defense counsel were proper.

d. Rebuttal

Anthony contends that the prosecutor's reference to Anthony "going home tonight" was an impermissible statement that Anthony was in custody. In order to succeed on appeal, Anthony must show that the statement was improper and that, in the context of the entire trial, the improper statement prejudiced his substantial rights. *Cordoba-Mosquera*, 212 F.3d at 1198.

This court has expressed concern over the potential prejudice arising from the jury's knowledge that the defendant has been incarcerated while awaiting trial. *United States v. Harris*, 703 F.2d 508, 510 (11th Cir. 1983) (concluding that a defendant's appearance at trial dressed in prison clothes prejudiced the jury but explaining that reversal was not warranted if the error was harmless beyond a reasonable doubt). A brief utterance or comment of the word "jail," "prison," or "custody," however, does not constitute *per se* reversible error. *See United States v. Villabona-Garnica*, 63 F.3d 1051, 1058 (11th Cir. 1995).

Here, Anthony's cousin, Tremaine King, testified that he had obtained the gun the day before the arrest

and had brought it into the bedroom. After the defense reminded the jury in closing argument that Tremaine admitted the gun was his, the government in rebuttal asserted that Tremaine's testimony was simply that of a young boy trying to protect his cousin, "to try to let his cousin go home tonight too."

Upon review, we conclude the prosecutor's rebuttal argument did not violate due process. First, it was a single comment and did not directly reference — or arguably even imply — Anthony's custody status. Second, the jury was instructed that what the lawyers say is not evidence, and we presume the jury followed its instructions. *United States v. Simon*, 964 F.2d 1082, 1087 (11th Cir. 1992). Third, the evidence against Anthony was overwhelming. Accordingly, Anthony cannot show that the statement resulted in prejudice.

e. Cumulative effect

"[T]he cumulative effect of several errors that are harmless by themselves could so prejudice the defendant's right to a fair trial that a new trial might be necessary." *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). "In addressing a claim of cumulative error, [this court] must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997). Where there is no error or only a single error, there can be no cumulative error. *See United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004).

Because, as discussed above, there were no errors, there could be no cumulative error. *Waldon*, 363 F.3d at 1110.

3. Sentencing Enhancement

Anthony argues that the district court lacked jurisdiction to impose the mandatory minimum sentence for the crack cocaine offense because the government's § 851 notice failed to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement.

Relevant to the issue of notice, Anthony was indicted for possession with intent to distribute five grams or more of crack, in violation of 21 U.S.C. § 841(a) and (b)(1)(B). Prior to trial, the government filed a notice of enhanced penalties under 21 U.S.C. § 851 because Anthony had a prior conviction. The notice identified the prior offense as a conviction "in Miami-Dade County, Miami, Florida, in case number F01-039526 (Cocaine Possession with Intent to Sell/Deliver & Cannabis Possession with Intent to Sell/Deliver)."

We review *de novo* questions regarding the adequacy of a § 851 notice. *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007).

Section 851(a)(1) provides:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United

> States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon. . . . Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C. § 851(a)(1). The purpose of § 851(a)(1) is to "allow the defendant to contest the accuracy of the information . . . [and] to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *United States v. Williams*, 59 F.3d 1180, 1185 (11th Cir. 1995).

The § 851 "notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose the enhanced sentence."[3] *United States v. Jackson*, 544 F.3d 1176, 1184-85 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1925 (2009); *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007); *United States v. Thompson*, 473 F.3d 1137, 1144 (11th Cir. 2006). When a notice of enhancement contains minor errors, this court will find § 851 compliance as long as the notice, despite the errors, unambiguously signaled the government's intent. *Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001).

Importantly, the text of the statute does nothing more than require the government to file notice before trial or entry of a guilty plea; it does not specify how to satisfy the notice requirement. To answer this

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[3] Although Anthony did not challenge the adequacy of the notice before the district court, because the issue is jurisdictional, Anthony can raise it at any time. *United States v. Giraldo-Prado*, 150 F.3d 1328, 1329 (11th Cir. 1998).

question, this court has considered the purpose behind the notice requirement. *See Ramirez*, 501 F.3d at 1239.

Here, the notice was filed prior to trial and identified the prior conviction by case number, offense, and venue. Contrary to Anthony's claim, this was sufficient to meet the first purpose of the notice requirements and enabled Anthony to contest the accuracy of the information.

The question is whether the notice meets the second requirement, the identification of the relevant statute. There is no dispute that the notice failed to identify the statute under which the enhanced penalty fell. Section 841(b) allows for enhanced penalties ranging from a ten-year mandatory minimum to life imprisonment depending on the amount of drugs involved and the type of prior conviction. *See* 21 U.S.C. § 841(b)(1)(A), (B), (C).

In this case, the indictment charged Anthony with possession with intent to distribute five grams or more of crack in violation of § 841(b)(1)(B). Thus, Anthony should have known that he faced an enhanced sentence of ten years' imprisonment based on the amount of drugs and his prior felony conviction. Moreover, Anthony conceded at sentencing that he faced the ten-year mandatory minimum sentence, indicating that he was not confused by the failure to list the statutory provision in the § 851 notice.[4] On

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[4] Anthony's reliance on *United States v. Bowden*, 2009 U.S. App. LEXIS 281, 2009 WL 32755 (11th Cir. Jan. 7, 2009), is misplaced. We are not bound by unpublished opinions. Nevertheless, the facts of the case are distinguishable. In *Bowden*, the notice listed the wrong conviction date and the wrong enhancement statute. In contrast, here, the government

these facts, we conclude the notice was sufficient to meet the purposes of § 851 when considered in conjunction with the indictment.

For the foregoing reasons, we affirm Anthony's convictions and sentences.

AFFIRMED.

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listed the case number of the prior conviction, indicating to Anthony precisely which conviction on which the government relied. Moreover, the indictment specified the amount of drugs and the statutory provision setting forth the penalties.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15488
Non-Argument Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
RODERICK BROWN, DEFENDANT- APPELLANT

Sept. 25, 2009

PER CURIAM:

In this direct appeal, Roderick Brown appeals (1) his 120-month concurrent sentences for conspiracy to distribute cocaine and possession with intent to distribute cocaine and (2) his conviction and 60-month consecutive sentence for possession of a firearm during a drug trafficking crime. After review, we affirm.

I. BACKGROUND

After filing a 28 U.S.C. § 2255 motion, Brown was granted this out-of-time direct appeal. On appeal, Brown argues that: (1) the district court erred at his resentencing; (2) the government's § 851 enhancement notice was ineffective; and (3) his conviction on Count 8 is invalid. We first review Brown's original district

court proceedings, his § 2255 motion, and his resentencing.

A. Guilty Plea

Brown was charged with nine counts, but pled guilty only to these three counts: (1) conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and 846 (Count 1); (2) possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and 851 and 18 U.S.C. § 2 (Count 7); and (3) possession of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 8).

The government filed a sentencing-enhancement notice, under 21 U.S.C. § 851, listing Brown's two state felony drug trafficking convictions. The § 851 notice stated that it would rely on those convictions "for the purpose of invoking the enhanced punishment provisions of Title 21, United States Code, Sections 841(b)(1)(C) and 851, as to any sentence imposed upon the Defendant, upon his conviction of the charges contained in the present case." The government served defense counsel with the § 851 notice "by facsimile."

Brown pled guilty to Counts 1, 7, and 8 in exchange for dismissal of the remaining six counts. The plea agreement expressly noted that Brown would be subject to these penalties: (1) on Counts 1 and 7, a mandatory minimum of 10 years' and up to life imprisonment and (2) on Count 8, a mandatory consecutive term of five years' imprisonment. Although the § 851 notice referred to § 841(b)(1)(C),

the plea agreement's reference to a 10-year mandatory minimum is the correct sentence required by § 841(b)(1)(B).[1]

The plea agreement also contained a waiver of Brown's right to appeal or collaterally attack his sentence "[t]o the maximum extent permitted by federal law," unless the sentence resulted from "an upward departure from the otherwise applicable sentencing guideline range" or the government appealed. The government agreed to recommend a sentence at the low end of the guidelines range.

At the plea hearing, the government made the following factual proffer of Brown's offense conduct:

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[1] Section 841(b)(1)(B) is the penalty provision for violations of § 841(a) involving, *inter alia*, 500 grams or more of a mixture or substance containing a detectable amount of cocaine, which was the drug quantity charged in Counts 1 and 7. 21 U.S.C. § 841(b)(1)(B)(ii). Section 841(b)(1)(B) requires a mandatory minimum sentence of five years' imprisonment and allows up to 40 years' imprisonment for a § 841(a) violation involving this drug quantity of cocaine. *Id.* § 841(b)(1)(B). However, if a person commits such a violation after being convicted of a felony drug offense, § 841(b)(1)(B) requires a mandatory minimum sentence of 10 years' imprisonment and allows up to life imprisonment. *Id.*

Section 841(b)(1)(C) does not apply to Brown's case as it is the penalty provision for offenses involving the drugs gamma hydroxybutyric acid and flunitrazepam and the controlled substances in schedules I and II of 21 U.S.C. § 812(c), none of which was charged in Counts 1 and 7. 21 U.S.C. § 841(b)(1)(C). Section 841(b)(1)(C) imposes a maximum sentence of 20 years' imprisonment for violations involving such drugs. *Id.* If a person commits such a violation after a felony drug conviction, § 841(b)(1)(C) imposes a maximum sentence of 30 years' imprisonment. *Id.* Section 841(b)(1)(C) does not impose a mandatory minimum sentence in either situation. *Id.*

[I]n the summer of 2002 an agent or officers from the Dekalb County drug task force began an investigation into the codefendant Gwendolyn Brown, and as part of this investigation a Dekalb County police officer went undercover and began purchasing cocaine from Gwendolyn Brown. It became apparent to them right away that she was being supplied from somewhere, and during the course of the investigation, specifically late in the summer, the undercover officer was present when the defendant, Mr. Roderick Brown, delivered a quantity of cocaine to Ms. Gwendolyn Brown, no relation by the way, your honor, so that Ms. Gwendolyn Brown could then sell the cocaine to the undercover officers. Once the officers were able to identify the defendant Roderick Brown, they set up a deal with Gwendolyn Brown and at the same time set up surveillance on Mr. Roderick Brown's apartment in Smyrna, Georgia.

When the deal was set up, Ms. Gwendolyn Brown said she had to call her supplier. She placed a phone call, which phone records indicated was placed to Roderick Brown. The agents surveilling Mr. Brown's apartment actually saw him leave the apartment then right after the phone call was made, return to the apartment, get a paper bag, bring it out to his car and leave on interstate county 20 to come to Dekalb County.

> Police officers stopped Mr. Brown in his vehicle on interstate 20 just before he got to the exit where Ms. Gwendolyn Brown was waiting. Inside his vehicle, in the paper bag he had been seen carrying, was a quantity of cocaine, about 725 grams of powder cocaine. Additionally, in the vehicle with him was a Taurus 357 caliber revolver.

Brown agreed with the government's factual proffer of his offense conduct.

At the plea hearing, the district court read Counts 1, 7, and 8, including the references to 21 U.S.C. § 841(b)(1)(B) in Counts 1 and 7. The government then reviewed the statutory sentencing ranges on each count, explaining that Counts 1 and 7 had a mandatory minimum of 10 years' imprisonment. The district court reviewed the sentence appeal waiver with Brown, and Brown said that he understood it. The district court accepted Brown's guilty plea.

B. Sentencing

The Presentence Investigation Report ("PSI") calculated Brown's offense level as 25 and criminal history category as I, which yielded an advisory guidelines range of 57 to 71 months' imprisonment. However, the PSI noted that the drug Counts 1 and 7 carried mandatory minimum sentences of 120 months' imprisonment and that the firearm Count 8 carried a mandatory consecutive term of 60 months' imprisonment.

At the sentencing hearing in April 2004, the district court again reviewed the mandatory minimum

sentences. Brown's counsel conceded that "there is nothing the court can do at this point, nothing I can do, so that would leave a sentence of 180 months." The district court sentenced Brown to concurrent terms of 120 months' imprisonment on Counts 1 and 7, followed by a consecutive term of 60 months' imprisonment on Count 8.

On April 26, 2004, the district court entered judgment on Brown's convictions and sentences. Brown's counsel did not file a notice of appeal. Instead, Brown filed a *pro se* notice of appeal six months later, which this Court *sua sponte* dismissed for a lack of jurisdiction.

C. Section 2255 Motion to Vacate

Subsequently, Brown filed a *pro se* 28 U.S.C. § 2255 motion to vacate his sentence challenging his sentence and plea agreement as illegal and his trial counsel as ineffective. Brown asserted that his attorney never filed a notice of appeal, even though Brown wanted to appeal and his attorney agreed to file the notice. Brown later informed the district court that he wished to pursue only this denial-of-appeal claim. Brown requested that the district court vacate his sentences, reimpose the same sentences (with or without a hearing), and allow him to proceed on direct appeal.

In March 2006, the district court denied Brown's § 2255 motion, and Brown timely appealed. The district court granted him a certificate of appealability on the issue of whether "he was denied effective assistance of counsel when his attorney allegedly failed to file a

notice of appeal on his behalf, despite his alleged request that his attorney do so."

While Brown's appeal of the denial of his § 2255 motion was pending in this Court, the government moved the district court to hold an evidentiary hearing on (1) whether Brown requested his attorney to file a notice of appeal and (2) if not, whether Brown's attorney adequately consulted with him about an appeal. The government contemporaneously moved this Court to stay Brown's § 2255 appeal, and we did so. The district court granted the government's motion for an evidentiary hearing. This Court then granted the government's motion to remand Brown's case to the district court and entered an order stating, "This matter is REMANDED IN FULL."

At the § 2255 evidentiary hearing, Brown and Daniel Kane, Brown's former counsel, testified. The district court then entered an order finding that Kane was ineffective for failing to consult with Brown about the advantages and disadvantages of a direct appeal. In Brown's § 2255 case, the district court granted Brown an out-of-time direct appeal.

Brown filed a motion for reconsideration of the district court's order in his § 2255 case. Brown noted that he never filed a motion for an out-of-time direct appeal, but rather filed a § 2255 motion asking that his sentences be vacated. Brown argued that the district court failed to comply with this Court's "remand in full" and should have held a new sentencing hearing to address Brown's sentencing arguments. Brown argued to the district court that the government's § 851 notice incorrectly cited § 841(b)(1)(C), which did not provide for an enhancement of the mandatory minimum sentences

for the offenses charged in Counts 1 and 7. Brown argued that his original sentences on Counts 1 and 7 thus were illegally based on incorrect mandatory minimum sentences.

The district court granted Brown's motion for reconsideration. The district court stated that it erred in saying it was granting Brown's motion for an out-of-time appeal because Brown had filed only a § 2255 motion. The district court amended its order to state that it was granting Brown's § 2255 motion, vacating his original judgment and sentences, and scheduling a resentencing hearing.[2]

D. Resentencing

Before the resentencing hearing, Brown filed a memorandum reiterating his previous claim that the government's § 851 notice was ineffective and that the mandatory minimum sentences for Counts 1 and 7 should have been 60, not 120, months' imprisonment. As to the indictment, Brown argued that it failed to allege a crime under § 924(c) on Count 8 because it stated that he "possessed" a firearm "during and in relation to" a drug trafficking crime, instead of alleging that he "possessed" a firearm "in furtherance of" a drug trafficking crime or "used or carried" a firearm "during and in relation to" a drug trafficking crime.

In response, the government (1) filed an amended § 851 notice changing the enhancement citation from 21 U.S.C. § 841(b)(1)(C) to § 841(b)(1)(B), (2) argued

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[2] The government did not appeal this order.

that the § 851 notice timely placed Brown on notice of his two prior convictions on which the government relied, and (3) pointed out that Brown was not entitled to a de novo resentencing because this Court did not vacate Brown's sentences but remanded only on the issue of his counsel's failure to file a notice of appeal. The government also argued that Brown could not now challenge the indictment without withdrawing his guilty plea.

At the resentencing hearing, the district court declined to consider any of Brown's arguments and simply re-imposed Brown's original sentences.[3] Brown timely appealed the district court's order reimposing his original sentences.

II. DISCUSSION

A. Reimposition of Original Sentences

Brown argues that the district court erred in reimposing his original sentences and declining to consider his sentencing arguments in light of this Court's remand in full.[4] In similar § 2255 cases where a district court found a defendant was denied his right to a direct appeal, we have instructed that the sentences should be vacated and reimposed to allow a timely appeal, as follows:

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[3] After the resentencing hearing, Brown filed a supplemental memorandum, arguing that the § 851 notice was served improperly on Brown's counsel by facsimile.

[4] We review de novo questions of law, including a district court's determination regarding the scope of its legal authority. *United States v. Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001).

> When the district courts of this circuit conclude that an out-of-time appeal in a criminal case is warranted as the remedy in a § 2255 proceeding, they should effect that remedy in the following way: (1) the criminal judgment from which the out-of-time appeal is to be permitted should be vacated; (2) the same sentence should then be reimposed; (3) upon reimposition of that sentence, the defendant should be advised of all the rights associated with an appeal from any criminal sentence; and (4) the defendant should also be advised that the time for filing a notice of appeal from that re-imposed sentence is ten days, which is dictated by [Federal Rule of Appellate Procedure] 4(b)(1)(A)(i).

United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000). In following this Phillips procedure, a district court is not required to hold a resentencing hearing. *United States v. Parrish*, 427 F.3d 1345, 1348 (11th Cir. 2005). Accordingly, after finding that Brown was entitled to an out-of-time direct appeal, the district court properly followed the Phillips procedure by reimposing Brown's original sentences to allow that direct appeal.

Brown also argues that this Court's remand permitted the district court to consider any sentencing issue anew. Brown relies on *United States v. Jones*, 36 F.3d 1068, 1069-70 (11th Cir. 1994), where the district court was allowed to consider the defendant's drug quantity challenge on remand. Jones, however, involved the district court's authority to consider sentencing issues after this Court had vacated the defendant's sentence on direct appeal and remanded in

full to the district court. *Id.* In contrast, our remand here came on appeal of the denial of Brown's § 2255 motion. This Court did not vacate Brown's original sentences. Rather, we remanded to the district court, on request by the government, for an evidentiary hearing on Brown's § 2255 claim that his counsel was ineffective for failing to file a notice of appeal. Because the procedural posture of this case was akin to Phillips, not Jones, the district court properly followed the Phillips procedure after awarding Brown an out-of-time direct appeal.

B. Brown's Direct Appeal as to § 851 Notice

In his direct appeal, Brown challenges his drug sentences on the grounds that the government's § 851 notice was ineffective because (1) it was served by facsimile and (2) it cited 21 U.S.C. § 841(b)(1)(C), rather than § 841(b)(1)(B), as the relevant penalty provision.[5] Because the § 851 notice was deficient, Brown argues that the district court lacked jurisdiction and power to increase his drug sentences from a 60-month to a 120-month mandatory

[5] To the extent that Brown argues that his trial counsel was ineffective for failing to object to his sentences on the grounds that he raises now, we decline to consider those issues on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003). The district court's evidentiary hearing was limited to the issue of whether Brown's trial counsel should have filed a notice of appeal. Ineffective counsel claims generally are heard on collateral review where the record can be developed. Also, the issue of whether his ineffective assistance of counsel claims were waived by his sentence appeal waiver can be addressed at that time.

minimum.[6] The government responds that Brown's claims are barred by his sentence appeal waiver.

A defendant may waive his right to appeal his sentence as part of a plea agreement. *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999). But we have stated that "a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)" and that "this jurisdictional defect is not waivable." *Harris v. United States*, 149 F.3d 1304, 1306, 1309 (11th Cir. 1998) (concluding that a challenge to a § 851 notice was not procedurally defaulted, even where the defendant did not raise it in the district court or on direct appeal, because the issue is jurisdictional).[7] The government stresses that Brown's case is materially different from *Harris*, where the government did not file a § 851 notice at all until after the defendant's

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[6] We review de novo the adequacy of a § 851 notice. *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007). "Subject matter jurisdiction of the district court is a question of law subject to de novo review." *United States v. Moore*, 443 F.3d 790, 793 (11th Cir. 2006).

[7] This Court in *Harris* explained that:

> "An enhanced sentence is a special remedy prescribed by the Congress; prosecutorial discretion is vested in the executive branch of the government, and the district court has no authority to exercise it or pretermit it. . . . Unless and until prosecutorial discretion is invoked and the government files and serves an information as required by Sec. 851, the district court has no power to act with respect to an enhanced sentence; it can no more enhance the sentence than it could impose imprisonment under a statute that only prescribes a fine." 149 F.3d at 1306 (quoting *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983)).

guilty plea and Harris had not agreed to a sentence appeal waiver. We have not had an opportunity previously to apply *Harris* in a case where a defendant has a sentence appeal waiver and the § 851 notice was timely filed before the plea. But we need not confront these thorny jurisdictional and waiver issues here because, as outlined below, both of Brown's challenges to the § 851 notice lack merit in any event.

First, Brown argues that the government did not properly serve his counsel with the § 851 notice. *See United States v. Novaton*, 271 F.3d 968, 1015 (11th Cir. 2001). Although the government timely served the § 851 notice on Brown's counsel and Brown admits the notice was received, Brown complains that the service was by facsimile and his counsel had not consented in writing to service by electronic means.[8] Section 851 itself does not specify how service shall be made. Rather, Brown is relying on the service procedures in the federal rules. However, Brown made no objection to the form of service in the district court. Furthermore, we have upheld § 851 notices where the government technically did not comply with § 851. *See, e.g.*, *United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990) (upholding § 851 notice where the government filed a § 851 notice four days after the start of trial, which was contrary to § 851(a)'s requirement that the notice be filed before trial, because "[b]y personally serving [the defendant] and his counsel with a copy of the information prior to

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[8] *See* Fed. R. Crim. P. 49(b) (noting that "[s]ervice must be made in the manner provided for a civil action"); Fed. R. Civ. P. 5(b)(2)(E) (stating that "[a] paper is served under this rule by . . . sending it by electronic means if the person consented in writing").

trial, and by advising the court orally that it was filing an information for purposes of sentence enhancement, the government complied with the mandatory requirements of section 851"); *see also Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001) (upholding § 851 notice where the government listed the incorrect date of the defendant's prior conviction).

As in *Weaver*, the government here complied with § 851(a) by filing the § 851 notice with the court and by timely sending it to Brown's attorney before his guilty plea. Neither Brown's attorney nor Brown claimed that he did not receive the government's § 851 notice. And, as noted above, there was no objection to service by facsimile in the district court. Thus, as in Weaver, we conclude that the government's notice complied with § 851(a).

Second, Brown argues that the district court lacked jurisdiction to enhance his drug sentences because the government's § 851 notice incorrectly cited the penalty provision in § 841(b)(1)(C) instead of § 841(b)(1)(B).[9] In *Perez*, we addressed a similar challenge to a technical error in the contents of a § 851 notice. The government's § 851 notice incorrectly stated that the defendant's prior conviction occurred in 1991 instead of 1992. *Perez*, 249 F.3d at 1263. This Court concluded that the government's notice complied with § 851(a) because it was timely filed with the court, was timely served upon the defendant's counsel, and described the prior conviction. *Id.* at 1266. We said that, "[d]espite the incorrect last digit in the year of the prior conviction, the Original Information unambiguously signaled the government's intent to

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[9] See *supra* note 1.

rely upon a specific prior cocaine conviction in Florida to enhance [the defendant's] sentence." *Id.* This Court also noted that the defendant "does not allege any confusion as to which conviction the government referred" in the § 851(a) notice. *Id.* at 1267.

Here, the government similarly complied with § 851's requirements, despite the incorrect citation to § 841(b)(1)(C). The government timely filed the notice with the court and timely served Brown's counsel with the notice. The § 851 notice correctly listed Brown's prior convictions. Despite the citation error, Brown was fully aware that the penalty provisions of § 841(b)(1)(B) applied because: (1) Counts 1 and 7 expressly charged Brown under § 841(b)(1)(B); (2) the plea agreement stated that the mandatory minimum sentences on Counts 1 and 7 were 10 years, and 10 years is the enhanced sentence provided for in § 841(b)(1)(B); and (3) Brown acknowledged those mandatory minimum 10-year terms at the plea hearing and sentencing. Brown never expressed any confusion regarding the contents of the § 851 notice or the applicable mandatory minimum 10-year sentences during the original district court proceedings.

For these reasons, we affirm Brown's 120-month concurrent sentences on the drug Counts 1 and 7.[10]

C. Insufficient Charge in Count 8

Brown also claims that his conviction on Count 8 is invalid because the indictment failed to allege a

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[10] We deny the government's January 16, 2009 motion to dismiss Brown's appeal.

federal crime under 18 U.S.C. § 924(c). A defendant violates section 924(c) if he (1) "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm" or (2) "in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). Count 8 alleged that Brown "during and in relation to a drug trafficking crime . . . did knowingly possess a firearm." Brown contends that the indictment failed to charge a § 924(c) offense because it combined the "during and in relation to" part of the first prong of § 924(c)(1)(A) with the "possesses a firearm" part of the second prong of § 924(c)(1)(A).[11]

It is clear that Count 8 of the indictment was defective in that it did not correctly state the elements of a § 924(c) offense. The question here is whether that defect invalidates Brown's guilty plea to Count 8. Before we can address that issue, however, we must first determine whether Brown waived this indictment-defect argument by pleading guilty. An unconditional guilty plea waives all non-jurisdictional challenges to a defendant's conviction. *United States v. Betancourth*, 554 F.3d 1329, 1332 (11th Cir. 2009). Brown argues that an indictment's failure to allege a federal offense is a jurisdictional defect that cannot be waived.

To resolve Brown's argument, we review the decisions in *United States v. Cotton*, 535 U.S. 625 (2002), and *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), which clarified that not all defects in an indictment are jurisdictional. In *Cotton*, the indictment charged the defendants with two drug

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[11] As noted earlier, we review *de novo* questions of subject matter jurisdiction. *Moore*, 443 F.3d at 793.

crimes but did not allege a drug quantity. 535 U.S. at 627-28. The district court made a drug quantity finding that increased the statutory maximum sentences and sentenced the defendants accordingly. *Id.* at 628. The Supreme Court addressed whether the omission from the indictment of a fact that increased the statutory maximum sentence, *i.e.*, the drug quantity, was a jurisdictional defect. *Id.* at 629, 122 S. Ct. at 1784.

In *Cotton*, the Supreme Court explained that the view that indictment defects were jurisdictional derived from *Ex parte Bain*, 121 U.S. 1 (1887), and was "a product of an era in which this Court's authority to review criminal convictions was greatly circumscribed." *Cotton*, 535 U.S. at 629. "The Court's desire to correct obvious constitutional violations led to a somewhat expansive notion of jurisdiction, which was more a fiction than anything else." *Id.* at 629 (internal quotation marks and citations omitted). The Supreme Court assessed that "*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, the courts' statutory or constitutional power to adjudicate the case." *Id.* at 630 (internal quotation marks omitted). After reviewing its precedent after *Bain*, the Supreme Court stated that "this Court some time ago departed from *Bain*'s view that indictment defects are 'jurisdictional'" and concluded that "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled." *Id.* at 631.

This Court then applied *Cotton* in *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) In *Peter*, we noted that the Supreme Court rejected the view that all indictment defects are jurisdictional and that this

Court had distinguished between indictment omissions (such as failing to allege an element of an offense) and indictments that affirmatively alleged conduct that either is not proscribed by the charging statute or is beyond the sweep of the charging statute. 310 F.3d at 713-14 (discussing our prior decisions in *United States v. Tomeny*, 144 F.3d 749 (11th Cir. 1998), *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), and *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc)). Defendant Peter's guilty plea to conspiring to violate the Racketeering Influenced and Corrupt Organizations Act ("RICO") and the predicate crime of mail fraud was based on his admission that he made misrepresentations in license applications that he mailed to a Florida state agency. *Id.* at 711. Because mail fraud offenses require that the object of the fraud be property and state licenses do not constitute such property, the defendant argued that his RICO conviction was invalid because his conduct was not a crime under the predicate mail fraud statute. *Id.*

In *Peter*, this Court agreed with the defendant that "the Government affirmatively alleged a specific course of conduct [*i.e.*, mailing state license applications containing misrepresentations] that is outside the reach of the mail fraud statute." *Id.* at 715. Thus, the indictment charged a non-offense. *Id.* In *Peter*, we also pointed out that in *Cotton* "the prosecution's evidence had been 'overwhelming and essentially uncontroverted' on the very point of fact which the indictment had erroneously failed to allege." *Id.* at 714 (quoting *Cotton*, 535 U.S. at 633).

In Brown's case, the indictment defect was an omission of an element of the charged crime and not

an affirmative allegation of conduct beyond the reach of the charging statute. As an initial matter, Count 8 specifically referred to 18 U.S.C. § 924(c) and thus provided Brown with adequate notice of the charge against him. *See United States v. Fern*, 155 F.3d 1318, 1325 (11th Cir. 1998) ("If an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge."); *United States v. Stefan*, 784 F.2d 1093, 1101-02 (11th Cir. 1986) ("[W]hen the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice.").

And, importantly, at the plea hearing, Brown admitted to conduct that established the omitted element of the charged crime. The government proffered these facts, which Brown admitted: (1) the government arranged a controlled drug transaction through Gwendolyn Brown, a woman to whom Brown previously had sold drugs; (2) immediately after the phone call with Gwendolyn Brown, officers saw Brown leave his apartment with a paper bag and enter his car; (3) officers stopped Brown in his vehicle just before he got to the interstate exit where Gwendolyn Brown was supposed to be waiting; and (4) a search of Brown's vehicle recovered the paper bag he had been seen carrying, which contained about 725 grams of powder cocaine, and a Taurus 357 caliber revolver. This conduct clearly falls within and establishes both of § 924(c)'s prongs. *See United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002) (concluding evidence that defendant carried a shoe-box containing a firearm and drugs to an arranged transaction was sufficient to

show he "carried" the firearm "during and in relation to" a drug trafficking crime and that the bulletproof vest, crack cocaine, loaded firearms, and ammunition seized from defendant's home was sufficient to show that he possessed the firearms "in furtherance of" drug trafficking); *United States v. Wilson*, 183 F.3d 1291, 1295-96 (11th Cir. 1999) (concluding evidence was sufficient to support a § 924(c) conviction where defendant was arrested in a vehicle containing two bottles of crack cocaine under the front seats and had a pistol on the dashboard); *United States v. Range*, 94 F.3d 614, 617 (11th Cir. 1996) (concluding evidence was sufficient to support a § 924(c) conviction where the defendant was arrested in the process of an arranged cocaine transaction and a loaded pistol and bag containing $40,000 in cash was found under the mat by the front seat of his vehicle).

Thus, the particular indictment omission in this § 924(c) case did not deprive the district court of power to adjudicate Brown's case or to accept Brown's guilty plea. Rather, the indictment defect here is non-jurisdictional and was waived by Brown's guilty plea.[12]

III. CONCLUSION

We affirm Brown's 120-month concurrent sentences on Counts 1 and 7 and his § 924(c) conviction and sentence on Count 8.

AFFIRMED.

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[12] We note that Brown does not argue that his guilty plea was not knowing and voluntary.